TESTIMONY

by Stan Soloway
President
Professional Services Council

before the

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

October 17, 2003

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The Professional Services Council (PSC) is pleased to respond to your invitation to testify on the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the "SAFETY Act", or "the Act"). PSC is the leading national trade association representing the professional and technical services companies doing business with the federal government. PSC's approximately 155 member companies perform billions of dollars in contracts annually with the federal government, providing the full range of services, including information technology, high-end consulting, engineering, economic, international development, scientific and environmental and remediation services. Moreover, PSC's members are among the leaders in the provision of homeland security and national security services.

As part of the comprehensive congressional response to the tragic events of September 11, 2001, Congress passed the Homeland Security Act of 2002 and created the Department of Homeland Security. Congress also took a bold step to include the SAFETY Act within that comprehensive statute.

Chairman Davis, we appreciate your personal leadership on this issue, along with that of Congressman Jim Turner, the former Ranking member of your Subcommittee, and now the Ranking member on the House Select Committee on Homeland Security.

PSC was actively involved in the debate on the acquisition policy and liability provisions leading toward enactment. The SAFETY Act represents an important step toward assuring the market's (including federal and state governments) ability to access the full scope of anti-terror technologies and capabilities. PSC strongly supports the SAFETY Act, and compliments the Department for moving expeditiously to issue proposed regulations on July 11, 2003 and interim final regulations this week. In addition, the Department is conducting public seminars to share information on the Act and the application process.

Attached to my statement are two sets of comments that PSC submitted to the Department on their proposed rule. One set was submitted from PSC alone. In addition, PSC joined with other associations in submitting complementary additional comments on the proposed rule.

I would like to offer PSC's perspectives on both the broader issues associated with liability protection and indemnification for homeland security technologies, as well as the more specific issues associated with the SAFETY Act and the Department of Homeland Security's rules to implement that statute.

Effective execution of the war on terrorism requires that the U.S. Government and others have access to the full range of technologies and technology-based solutions, from sensors to aid in the detection of biological agents to information systems that enhance the ability of the nation to defend itself against, and respond to, acts of terrorism. For many of these solutions, the potential for aiding in this critical battle is quite significant, but so too are the liabilities that could arise in the case of an extraordinary occurrence that could not reasonably be anticipated or protected against. As such, providing an appropriate degree of protection against those liabilities is vital.

Such liability protection for other technology areas is both common and accepted. The Defense Department has long had the authority to address extraordinary risk in its contracts. Such clauses are reasonably common but have rarely been invoked. Yet the security they provide is essential to both contracting parties. Similarly, the nuclear industry participates in a special program under the Price-Anderson Act, and the government routinely provides needed assistance and relief in the case of natural or other extraordinary disasters. These liability protections are not designed to protect companies from the day-to-day responsibility associated with the normal performance of their work. Rather, they exist to provide a reasonable degree of protection in the event of an occurrence that is anything but routine. Perfection in technology is, after all, not 100%. And our ability as a nation to capture and utilize needed technologies requires us to understand and address this fundamental reality.

Mr. Chairman, you, Congressman Turner, and others on this Committee in the last Congress recognized this reality for homeland security and proposed legislation to extend indemnification protections to anti-terrorism technologies similar to the "extraordinary relief" provisions afforded to a select group of defense technologies for which similar risks exist. Others proposed to approach the issue from a tort reform perspective to strictly limit the liabilities that any one technology developer could face.

Each of these approaches has merit. In the end, Congress opted to enact a tort reform regime through the SAFETY Act. We are appreciative that both the Congress through this legislation and the Administration in their regulatory implementation have clearly and unequivocally recognized the importance of providing reasonable protections. At the same time, the President has extended to additional Executive Branch agencies the limited authority to utilize the extraordinary relief contract protections previously only available to the national defense agencies. These are both important, and positive, steps forward.

However, from the technology services base perspective, these protections may be inadequate to address the very real and legitimate concerns we face. The SAFETY Act, while appropriately covering services as well as products, presents a set of complications unique to services that I will discuss in more detail. Likewise, the authority granted by the President to agencies to utilize "extraordinary relief" provisions in conjunction with the SAFETY Act is extremely narrow and complex, and will likely be rarely applied.

For those reasons, Mr. Chairman, the Professional Services Council greatly appreciates your continued leadership in this area and your and the committee's continued commitment to ensuring that the laws and regulations in this area maximize the Nation's ability to access and utilize the many new and promising technologies that can substantially assist the global war on terrorism.

TREATMENT OF SERVICES

PSC remains concerned that the proposed implementing regulations do not adequately address the critically important specifics relating to the Act's application to services. We are mindful that the regulatory flexibility is limited by the inherent tensions created by the underlying statute. Nonetheless, since services will likely account for a significant portion of the procurements of anti-terror technologies and solutions, it is critical that the regulations provide as much detail and specificity as possible. Moreover, it is equally important that the regulations provide for broad coverage and clear instruction and guidance for balancing the statutory direction with sound business practices that will benefit the government and purchases. However, we are concerned about what we have seen of the application kit prepared by the Department.

We compliment the Department for including the extensive background information in the notice accompanying the proposed rule. Having the Department spell out its interpretations of the Act and its legislative history, and giving the public information on areas where the Department has made an initial determination of how to implement the Act and where additional comments from the public are requested, was extremely valuable in the formulation of our comments on the proposed rules. We recommend that the Department incorporate as part of the regulation (not merely in background or supplemental information) the Department's interpretations and regulatory philosophy. By making these views part of the regulations, all participants will have ready access to the information and be able to use that information directly in the application and interpretation of other specific provisions of the regulations.

We support the strong statements of coverage under the law and regulations for those companies offering services to address terrorism. The law is properly technology-neutral with respect to the scope of coverage and the protections offered. In our view, the regulations should be written in a technology-neutral manner to the maximum extent practicable, and only provide technology-specific guidance when such information would specifically address a unique application of the law to a given technology.

TIMING

PSC appreciates the Department's issuance of interim rules this week. We recognize the difficulty of developing rulemaking on each and every provision of the Act, and the importance of maintaining an important balance between the flexibility to address technologies and circumstances with the certainty in the application process and protections of the Act that Sellers and purchasers require. The interim rules, which closely mirror the proposed July 11 rules, offer further but still inadequate clarity and guidance.

Furthermore, on September 12, 2003 the Department sought an expedited OMB approval for the forms that interested applicants can use to apply for Designation or Certification. It is in the Department's and the potential Sellers' best interests to immediately commence the application process for both Designation and Certification. However, these applications appear to be overly complex and unnecessarily burdensome. We are concerned that this daunting process will dissuade applicants, or worse, dissuade companies from offering anti-terrorism technologies to the marketplace.

DESIGNATION AND CERTIFICATION OF QUALFIFIED ANTI-TERRORISM TECHNOLOGIES ("QATT")

We support the broad scope of the term "qualified anti-terrorism technologies" under the law and regulations. We recommend that the categories of technologies that are available for Designation continue to be viewed broadly; this is particularly important when evaluating the application of the Act and regulations to services.

PSC worked directly with the Congress last year to ensure that a wide range of services, including support services and information technology, were included in the definition of "qualified anti-terrorism technology"("QATT"). In our view, the types of services that may qualify as a QATT include, but are not limited to, training, maintenance, systems integration, testing, installation, repair, safety services, modeling, simulation, systems engineering, clean-up and remediation services, protective services, research and development, vulnerability studies, emergency preparedness planning and risk assessments. Information technology is also typically considered a service, although the Act separately identifies information technology as a "technology" under the Act.

We were pleased to see the Department's acknowledgement of this broad scope of coverage in the background section of the proposed and interim rules. In addition, recognizing that providing "services" differs in some respects from providing "goods," we further recommended that a Seller may seek qualification eligibility based on coverage for a business area and not only for a particular technology use (such as for "hazardous material remediation services," not merely for anthrax remediation). It does not appear that the Department is willing to go that far, yet.

Sales of services (or sales that include services) to prevent and respond to terrorist attacks are likely to be the subject of the majority of the applications for Designation and Certification, in part because, as a practical matter, anti-terrorism devices will be of little or no use unless there are people who can install, operate, maintain, and repair those devices, as well as people who can design and implement the complex systems necessary to deploy anti-terrorism solutions. The review and approval process for Designation and Certification of anti-terrorism technology must be sufficiently flexible to address the special characteristics of these services offerings. It is hard to tell from the first reviews of the application process whether that flexibility exists.

As such, although some proposals for services contracts may provide definite specifications that will allow Designation at, or shortly after, the time of the selection of the winning proposal and award of a contract, many professional services are not provided according to "specifications" that are determined in advance. For anti-terrorism activities that require sophisticated information technology, a "systems integrator" or "solutions provider" is likely to provide key services to implement the overall anti-terrorism system. For complex information technology systems, the design of the system is often one of the tasks performed under the contract. The regulations, however, appear to contemplate that specifications will be determined before the Seller begins work under the contract. It is important that the regulations provide for QATT protection when systems design is part of the required contract performance. In the absence of such protection, Sellers may be unwilling to proceed.

The regulations should also provide that in appropriate circumstances relating to an anti-terrorism procurement, systems design and other services themselves may be designated as QATT from the inception of performance.

With respect to the Designation to be made by the Under Secretary, the proposed rule provides that it is valid and effective for a term of five to eight years (as determined by the Under Secretary based on the technology) commencing on the date of issuance. In our view, absent a change in circumstances initiated by the Seller after the Department's initial approval of the Designation, there is no public policy reason to impose any fixed period of time on the useful life of the Designation period of a QATT. Indeed, in some cases, a contract performance period can extend beyond five or eight years. The Department has not accepted this recommendation.

We also encourage the Department to make the effective date of the Designation the date of the application for Designation. The Department has rejected retroactive application.

Further the rule provides that a Designation shall terminate automatically, and have no further force or effect, if the QATT is significantly changed or modified. The rule defines the term "significant change" as one that could significantly affect the safety or effectiveness of the device," including a significant change or modification. We strongly oppose the automatic termination of the QATT Designation, even where based on significant changes or modifications. This must be a case-by-case determination.

With respect to the Certification for and application of the government contractor defense, we have assumed that the title "approved product list" in the Act and the proposed regulations is not intended by Congress or the Department to exclude services. The Act and the regulations intentionally use the term "anti-terrorism technology" to refer to the source of approval, and that term is specifically defined in the Act and regulations to include services. We encourage the Department to use its rulemaking authority to recognize that different information to support the application for Certification may be available and applicable to products that may not be available or applicable to services. We believe the Department has adopted this approach.

PROPRIETARY DATA

With respect to the issue of protecting company proprietary information, we compliment the Department for recognizing the importance of protecting the confidentiality of an applicant's intellectual property, trade secrets and other confidential information. It is important to explicitly provide procedures that applicants should follow to ensure their information can be protected. For example, we strongly recommend that the Department develop a proprietary data marking or other application notice by which applicants highlight or disclose those portions of its application it considers to be proprietary. For example, the Department could draw easily from the marking and identification process used in the federal procurement system. While the Department continues to make strong statements recognizing the importance of protecting proprietary data, it remains to be seen how that protection will be provided.

RELATIONSHIP BETWEEN SAFETY ACT AND P.L. 85-804

Finally, with respect to the relationship between the SAFETY Act and P.L. 85-804, we compliment the Department for addressing coverage of the relationship between these two important government contracting statutes and acknowledging that there are circumstances under which these two acts can, and should, co-exist. We recommend that the Department create a new section in their regulations to address this important matter, including a recognition that a broader application of 85-804, particularly for services, may well be needed to ensure appropriate protection for Sellers and, in turn, for DHS's ability to access those solutions.

CONCLUSION

This law and its implementing regulations are designed to create an incentive for the development and the deployment of anti-terrorism technologies. We hope that these technologies work so well that the U.S. never again faces a terrorist attack. But we must be prepared. PSC fully supports the SAFETY Act, and we are encouraged that the Department is moving expeditiously with final regulations and in processing applications. We hope the application process does not become a barrier to implementation.

PSC would welcome any opportunity to work cooperatively with this Committee, the House Select Committee, and the Department on the further evaluation of the regulations and in monitoring the implementation of the Act and regulations.

Mr. Chairman, PSC appreciates the opportunity to appear today and share our support for the SAFETY Act and for the efforts to stop terrorism. I would be pleased to respond to any questions.

PROFESSIONAL SERVICES COUNCIL

August 11, 2003

Docket Management Facility
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

By e-mail: http://dms.dot.gov

Re: Docket USCG-2003-15425; July 11 Department of Homeland Security Proposed Regulations Implementing the SAFETY Act

To Whom It May Concern:

The Professional Services Council (PSC) is pleased to submit these comments on the July 11 proposed regulations (68 F.R. 41420) issued by the Department of Homeland Security to implement the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the "SAFETY Act", or "the Act"). PSC is the leading national trade association representing the professional and technical services companies doing business with the federal government. PSC's approximately 155 member companies perform billions of dollars in contracts annually with the federal government, providing the full range of services, including information technology, high-end consulting, engineering, economic, international development, scientific and environmental and remediation services. Moreover, PSC's members are among the leaders in the provision of homeland security and national security services.

PSC strongly supports the SAFETY Act, and compliments the Department for moving expeditiously to issue proposed regulations. The SAFETY Act represents an important step toward assuring the government's ability to access the full scope of anti-terror technologies and capabilities.

However, PSC remains concerned that the regulations do not adequately address the critically important specifics relating to the Act's application to services vice products. We are mindful that the regulatory flexibility is limited by the inherent tensions created by the underlying statute. Nonetheless, since services will likely account for half or more of the federal government's procurements of anti-terror technologies and solutions, it is critical that the regulations provide as much detail and specificity as possible. Moreover, it is critically important that the regulations provide for robust application and that they provide clear instruction and guidance for balancing the statutory direction with sound business practices that will benefit the government. As noted later in these comments, PSC thus believes this must be an iterative regulatory policy and that, as a result of the comments received, the Department should seriously consider both a public meeting and additional rulemaking activities.

In addition, PSC has joined with other associations in separately submitting complementary additional comments on the proposed rule.

I. SUMMARY OF COMMENTS

1. We support the strong statements of coverage under the law and regulations for those companies offering services to address terrorism. The law is technology-neutral with respect to the scope of coverage and the protections offered. In our view, the regulations should be written in a technology-neutral manner to the maximum extent practicable, and only provide technology-specific guidance when such information would specifically address a unique application of the law to a given technology.

2. We compliment the Department for including the extensive background information included in the notice accompanying the proposed rule. Having the Department spell out its interpretations of the Act and its legislative history, and giving the public information on areas where the Department has made an initial determination of how to implement the Act and where additional comments from the public are requested, was extremely valuable in the formulation of our comments. As noted below, we recommend that the Department incorporate as part of the regulation (not merely in background or supplemental information) the Department's interpretations and regulatory philosophy. By making these views part of the regulations, all participants will have ready access to the information and be able to use that information directly in the application and interpretation of other specific provisions of the regulations.

3. PSC supports the Department promptly issuing any interim rule or rules to implement the Act. We recognize the difficulty of developing rulemaking on each and every provision of the Act, and the importance of maintaining an importance balance between the flexibility to address technologies and circumstances with the certainty in the application process and protections of the Act that Sellers and purchasers require. In our view, certain aspects of the regulations (such as the issues of the termination of a Designation or the transfer of a certification) can be deferred for subsequent rulemaking in favor of promptly publishing interim regulations addressing the application process for both Designation and certification, the procedures for protecting company proprietary information, and the insurance requirements.

4. Without regard to the timing of issuing any interim or final rules, we urge the Department to promptly (and if necessary separately) publish the application forms that interested applicants can use to apply for Designation or Certification and not wait until all application forms are complete. It is in the Department's and the potential Sellers' best interests to immediately commence the application process for both Designation and Certification. Other application forms discussed in the proposed rules (such as the application for transfer of Designation), while important, can be issued administratively in the next few weeks without jeopardizing the implementation of the Act or awaiting comprehensive interim or final regulations.

5. We support the broad scope of the term "qualified anti-terrorism technologies" under the law and proposed regulations, including the creation of an eighth evaluation criterion for Designation. We recommend that the categories of technologies that are available for Designation continue to be viewed broadly; this is particularly important when evaluating the application of the Act and regulations to services.

6. Proposed Section 25.5(f) provides that a Designation made by the Under Secretary shall be valid and effective for a term of five to eight years (as determined by the Under Secretary based upon the technology) commencing on the date of issuance. In our view, absent a change in

circumstances initiated by the Seller after the Department's initial approval of the Designation, there is no public policy reason to impose any fixed period of time on the useful life of the Designation period of a Qualified Anti-Terrorism Technology ("QATT"). We also encourage the Department to make the effective date of the Designation the date of the application for Designation.

7. Proposed Section 25.5(i) provides that a Designation shall terminate automatically, and have no further force or effect, if the QATT is significantly changed or modified. The proposal defined the term "significant change" as one that could significantly affect the safety or effectiveness of the device," including a significant change or modification. We strongly oppose the automatic termination of the QATT Designation even where based on significant changes or modifications.

8. With respect to the Certification for, and application of the government contractor defense, we assume that the title "approved product list" in the Act and the proposed regulations is not intended by Congress or the Department to exclude services. The Act and the regulations intentionally use the term "anti-terrorism technology" to refer to the source of approval, and that term is specifically defined in the Act and regulations to include services. We encourage the Department to use its rulemaking authority to recognize that different information to support the application for Certification may be available and applicable to products that may not be available or applicable to services.

9. With respect to the issue of protecting company proprietary information, we compliment the Department for recognizing the importance of protecting the confidentiality of an applicant's intellectual property, trade secrets and other confidential information. Any interim or final rule should explicitly provide procedures that applicants should follow to ensure their information can be protected. For example, we strongly recommend that the Department develop a proprietary data marking or other application notice by which applicants highlight or disclose those portions of its application it considers to be proprietary.

10. Finally, with respect to the relationship between the SAFETY Act and P.L 85-804, we compliment the Department for acknowledging both the Congressional and Departmental coverage of the relationship between these two important government contracting statutes and that there are circumstances under which these two acts can, and should, co-exist. We recommend that the Department create a new part to these regulations to address this important matter.

II. REQUEST FOR PUBLIC MEETING

1. The notice of proposed rulemaking requests comments on the desirability of holding a public meeting on the regulations.[1] We believe a public meeting that provides for an exchange of views between the Department (and other appropriate government officials) and interested members of the public on key aspects of this regulation would be beneficial. We do not see any value to such a meeting if the Department would only repeat the elements of the proposed rule or if the public would only be permitted to make oral presentations that could be appropriately included in written comments.

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[1] 68 F.R. 41420 (July 11, 2002)

2. However, following the formal submission of all comments on this proposed rule, Department representatives may find helpful the opportunity to raise questions to the public about any comments submitted, and for Department representatives to address any significant conflicts raised in the comments. The public would similarly benefit from such a public meeting. However, we do not recommend that the rulemaking process be delayed simply to hold such a meeting; we believe the Department's highest priority should be to provide interim or final guidance on the application process and the key elements of the qualification standards for those companies interested in seeking Designation as a qualified anti-terrorism technology and certification for the government contractor defense.

III. ITERATIVE RULEMAKING WILL FURTHER THE TIMELY IMPLEMENTATION OF THE ACT

1. PSC supports the Department promptly issuing any interim rule or rules to implement the Act. We recognize that the SAFETY Act regime is a series of inter-related provisions. But as the Department notes in the Regulatory Background and Analysis Section of the proposed rules, the "Department will begin implementation of the SAFETY Act immediately with regard to federal acquisitions of anti-terrorism technologies and will begin accepting other SAFETY Act applications on September 1, 2003."[2] We strongly support the prompt implementation of the Act and urge the Department to move expeditiously to issue interim final regulations on the essential opening aspects of coverage, such as the application process, the insurance requirements, and the treatment of company proprietary information. Other aspects of the regulations (such as addressing the issues of the termination of a Designation or the transfer of a Certification) can be deferred for subsequent rulemaking over the next several weeks.

2. We recognize the difficulty of developing rulemaking on each and every provision of the Act, and the importance of maintaining an important balance between the flexibility to address technologies and circumstances with the certainty in the application process and protections of the Act. We do not believe in a "static" set of regulations that is unrelated to the changing threat or to the changes in technologies. Yet it is important to start, and to start quickly with what the Department knows today.

IV. EXPLICITLY INCORPORATE RELEVANT "BACKGROUND" INFORMATION INTO THE REGULATIONS

1. We compliment the Department for providing an extensive background statement accompanying the actual regulations. In that background statement, the Department has provided useful information on the legislative history of the SAFETY Act, the Department's interpretation of the Act and its regulatory philosophy for implementing the Act. The background section explains the inter-relationship between key provisions of the Act, and between this Act and other related provisions of law. Finally, the background section highlights areas where the Department is seeking additional public comments.

2. This extensive background section was extremely valuable. It provided the public with a clear indication of the Department's approach and areas of uncertainty. It requested public comments on areas where the Department thought additional commentary would aid in the development of final regulations and help guide the Department in the implementation of the Act. We encourage

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[2] 68 F.R. 41420 (July 11, 2003)

the Department to keep the lines of communication with the public open and to accept additional comments on any provision of the emerging regulations.

3. In addition, we strongly recommend that, in any interim or final rule, the Department create a new subpart of 6 C.F.R. Part 25, possibly Part 25.0, entitled "Introduction", wherein the Department includes within the text of the regulations its key regulatory philosophy (such as the intent that the definition of anti-terrorism technology be viewed broadly, or that the Department "eschews a one-size-fits-all" approach. These are important regulatory statements that are important to all who will use the regulations today and into the future, to implement and use the SAFETY Act and its regulations.

4. This placement is more than an issue of administrative law and interpretation. Many will have ready access to the formal regulations but not all will have such ready access to the one-time Federal Register publication. By having the Department's philosophy and approach included in a single document, officials in every department and agency, interested Sellers, insurance organizations and the public will have the needed information in a single location with authoritative affect.

V. SPECIFIC COMMENTS ON THE PROPOSED REGULATIONS

A. SECTION 25.2 -- DELEGATION

1. We recommend vesting all regulatory decision-making for the SAFETY Act in the Secretary of Homeland Security. Under the proposed rules, certain final decision-making is vested exclusively in the Under Secretary. Throughout the regulations, we recommend that it is the Secretary that has the authority under the law and regulations. It was the Secretary, for example, that issued these proposed rules!

2. Section 862(a) of the Act vests responsibility for administration of the SAFETY Act in the Secretary of Homeland Security; other provisions of the Act require the Secretary to take certain actions.[3] Section 25.2 of the proposed rules provide that all functions of the Secretary under the Act may be delegated to the Under Secretary for Science and Technology or the Under Secretary's designees.[4]

3. Unless Congress has constrained the authority of the Secretary of Homeland Security to delegate functions assigned to him by law, the Homeland Security Act of 2002 allows the Secretary of Homeland Security to delegate any function to other officials within the Department.[5] We do not object to the Secretary's delegation of functions to implement the SAFETY Act to the Under Secretary or even delegating certain functions to the Assistant Secretary. While we appreciate the explicit information about who is responsible for implementing portions of the SAFETY Act, we are concerned that final authority for certain

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[3] For example, Section 862(c) provides authority for the Secretary to issue regulations; section 863(d) grants the Secretary exclusive authority to review and approve technologies for the government contractor defense and to issue a certificate of conformance and place a technology on the "Approved Product List for Homeland Security"; section 864(a)(1) requires the Secretary to set the type and amount of liability insurance for Sellers; and section 865(2)(A) provides that the Secretary determines what constitutes "an act of terrorism."

[4] 68 F.R. 41428 (July 11, 2003)

[5] See, generally, Homeland Security Act of 2002, P.L. 107-296

critical determinations under the regulations improperly stops at a level below the Secretary.[6] Other concerns arise when no one is serving in the assigned position, such as with the position of the Assistant Secretary for Plans, Programs and Budget.[7]

4. We therefore recommend that any interim or final regulations state that the authority vests in the Secretary; to the extent that delegations are made (pursuant to Section 25.2 of these regulations or other authority provided to the Secretary), those delegations can be made administratively, with the public informed through separate administrative notices, the Department's website, the application process or otherwise about who in the Department has the authority to act on behalf of the Secretary in implementing this act.

B. SECTION 25.3 DESIGNATION OF QUALIFIED ANTI-TERRORISM TECHNOLOGIES ("QATT")

1. Scope of the definition

a. Section 862(b) of the Act authorizes the Secretary of Homeland Security to designate anti-terrorism technologies that qualify in accordance with the criteria in the Act and implementing regulations for protection under the risk management procedures of the statute.[8] The Act specifically defines the term "qualified anti-terrorism technology" as:

> "any product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts may otherwise cause, that is designated as such by the Secretary."[9]

b. PSC worked directly with the Congress to ensure that a wide range of services, including support services and information technology, were included in the definition of "qualified anti-terrorism technology" ("QATT"). In our view, the types of services that may qualify as a QATT include, but are not limited to, training, maintenance, systems integration, testing, installation, repair, safety services, modeling, simulation, systems engineering, clean-up and remediation services, protective services, research and development, vulnerability studies, emergency preparedness planning and risk assessments. Information technology is also typically considered a service, although the Act separately identifies information technology as a "technology" under the Act.

c. We were pleased to see the Department's acknowledgment of this broad scope of coverage. Paragraph 1 of the "Specific Issues" discussion in the Background Section of the proposed rule properly notes that the "Department recognizes that the universe of technologies that can be

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[6] Even Section 25.9 of the proposed regulations, entitled "Definitions" provides that the Assistant Secretary may be meant to apply to another other official of the Directorate of Science and Technology that the Under Secretary may designate. 68 F.R. 41432 (July 11, 2003)

[7] We note that the President nominated Dr. Albright for this position and on July 30, 2003 the Senate confirmed his nomination.

[8] Section 862(a) of P.L. 107-296 (Nov. 25, 2002)

[9] Section 865(1) of P.L 107-296 (Nov. 25, 2002)

deployed against terrorism includes far more than physical products."[10] We strongly recommend that the Department reiterate this expansive view in any interim and final regulations.

d. The Analysis portion of the Background section of the proposed rule also provides an important discussion of the Department's interpretation of the Act and the scope of the Secretary's authority. For example, the Background section notes:

> "the SAFETY Act applies to a very broad range of technologies…as long as the Secretary, as an exercise of discretion and judgment, determines that a technology merits Designation under the statutory criteria…Thus, consistent with Section 865 of the Act, Section 25.3(a) of the proposed rule defines qualified anti-terrorism technologies very broadly…"[11]

e. Section 25.3(a) of the proposed regulations provides that the Under Secretary may designate a qualified anti-terrorism technology for purposes of the protections under the Act, repeating the statutory definition.[12] We strongly recommend that the Department use its broad regulatory authority to also provide coverage for technologies that are "used, acquired or employed" as an anti-terrorism technology to better encompass the full range of services to be covered by regulations implementing the Act.

f. In addition, recognizing that providing "services" differs in some respects from providing "goods," we further recommend that a Seller may seek qualification eligibility based on coverage for a business area (such as for "hazardous material remediation services", not merely for anthrax remediation). We also recommend that the regulations provide for a "solicitation" qualification under which an offeror for a specific agency procurement may seek Designation for the specific use of a technology.

2. Approval criteria

Furthermore, Section 862(b) of the Act lists seven non-exclusive criteria that the Secretary shall consider when determining whether to make such Designation.[13] Section 25.3(b) of the proposed regulations repeats these seven criteria, and adds an eighth: "Any other factor that the Under Secretary may consider to be relevant to the determination or to the homeland security of the United States."[14] Consistent with the broad coverage of the Act and the recognition of the changing nature of the technologies that exist or that may emerge in the future to respond to threats to the homeland, we support the inclusion of this additional eighth evaluation standard.

3. Use of standards

a. Section 25.3(c) of the proposed rules provides that the Under Secretary may develop, issue, revise and adopt safety and effectiveness standards for various categories of anti-terrorism technologies, and may consider compliance with such standards that are applicable to a particular

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[10] 68 F.R. 41423 (July 11, 2003)
[11] 68 F.R. 41421 (July 11, 2003)
[12] 68 F.R. 41428 (July 11, 2003)
[13] Section 862(b) of P.L. 107-296 (Nov. 25, 2002)
[14] 68 F.R. 41428 (July 11, 2003)

anti-terrorism technology before any Designation will be granted.[15] We support the Department's acknowledgment that externally established standards might be useful in determining whether to adopt and use standards in the Designation of a QATT. By the same token, as the Analysis portion of the Background section of the notice states:

> "These criteria are not exclusive—the Secretary may consider other factors that he deems appropriate… The Secretary may, in his discretion, determine that failure to meet a particular criterion justifies denial of an application… However, the Secretary is not required to reject an application that fails to meet one or more of the criteria."[16]

b. Thus, while the use and reliance on standards may be appropriate in certain circumstances and for certain types of technologies, we believe the Act and the regulations also permit the Secretary flexibility to not apply external standards to certain technologies – such as services. We encourage the Secretary to provide notice to the public, hopefully with an opportunity to comment, before instituting such standards against a specific type of technology. It is also important that this portion of the regulations refer to the ability of a technology to qualify for Designation by meeting the substantial equivalence standard included in proposed Section 25.3(d).

c. Paragraph 7 of the Specific Issues section of the Background section requests comment on how the Department can best develop standards and implement the SAFETY Act provisions to provide market and industry incentives for the development and deployment of anti-terrorism technologies.[17] From our perspective, we view the use of standards as an important, but evolving practice. Applicants are encouraged to identify external studies and analyses that may exist or that could be reasonably available to demonstrate that a technology meets performance requirements. However, as noted above, external standards are not appropriate for all technologies and the Department should not try to force the application of standards to all technologies, including services. We encourage the Department to use its rulemaking authority under the SAFETY Act specifically, and other statutes, to seek additional public input on any specific standards that may be considered for adoption and application to these technologies. In addition, we believe the pre-Designation consultation process can be an effective way for the Department to identify relevant standards.

4. Substantial Equivalence

a. Section 25.3(d) provides that a technology may satisfy the criteria under paragraph (b) and be designated as a QATT, and comply with the standards in paragraph (c), by taking into consideration evidence that the technology is "substantially equivalent" to other, similar technologies ("predicate technologies") that have been previously designated as a QATT under the Act.[18] The proposed rule provides only two tests for determining whether a technology may be deemed to be "substantially equivalent to a predicate technology."[19]

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[15] 68 F.R. 41428 (July 11, 2003)
[16] 68 F.R. 41421 (July 11, 2003)
[17] 68 F.R. 41425 (July 11, 2003)
[18] 68 F.R. 41428 (July 11, 2003)
[19] 68 F.R. 41428 (July 11, 2003)

b. We strongly support the recognition of the concept of substantial equivalence and of a Seller's ability to point to predicate technologies to qualify for Designation as QATT. Even in paragraph (e) – relating to the duration and depth of review – the proposed regulations note:

> "For technologies with which the Federal Government or other government entity already has substantial experience or data (through the procurement process or through prior use or review), the review may rely in part upon that prior experience and, thus, may be expedited."[20]

c. We strongly support an expedited review and the authority provided in the regulations to rely on prior experience and substantial equivalence in making that eligibility determination.

5. Pre-application consultations

a. Section 25.3(h) provides flexibility to the Under Secretary to consult with potential SAFETY Act applicants regarding the need for or advisability of particular types of anti-terrorism technologies, although no pre-approval of any particular technology may be given. We strongly support this pre-application consultation. The Department and potential Sellers, as well as prospective developers of potential anti-terrorism technologies, will benefit from such consultation.

b. However, while the proposed regulations are properly silent on the scope of any technology that can take advantage of this pre-application consultation process, the supplemental information states, in part, that the Department may "provide feedback to manufacturers" regarding whether proposed or developing anti-terrorism technologies might meet the qualification factors under the Act, such that such feedback "may provide manufacturers with added incentive to commence and/or complete production of …technologies that may otherwise be produced or deployed…"[21] We encourage the Department to highlight in the text of Section 25.3(h) that the pre-application consultation process is technology-neutral and available to any and all potential applicants of anti-terrorism technologies, whether manufacturing or services.

c. The proposed regulations also state that this pre-consultation is discretionary by the Under Secretary, "although no pre-approval of any particular technology may be given."[22] Specific Issue #2 in the Supplemental information states: "To be sure, the Department cannot provide advance Designation, as some of the factors for the Secretary's consideration cannot be addressed in advance."[23] We acknowledge and agree that the pre-consultation process cannot be the source of a pre-Designation. However, we recommend that the regulations use the phrase from the supplemental information: "cannot provide advance Designation;" nothing in the regulations focuses on the "approval" of a technology – only whether the elements of the statute can be met so as to grant "Designation."

d. The proposed regulations also explicitly provide that the confidentiality provisions are applicable to such pre-application consultations.[24] We strongly support such statement and recommend that it be retained in any interim or final regulation.

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[20] 68 F.R. 41428 (July 11, 2003)
[21] 68 F.R. 41423 (July 11, 2003); Specific Issues #2 – Development of New Technologies
[22] 68 F.R. 41429 (July 11, 2003); Proposed Section 25.3(h)
[23] 68 F.R. 41423 (July 11, 2003); Specific Issues #2 – Development of New Technologies
[24] 68 F.R. 41428 (July 11, 2003)

6. Term of Designation

a. Proposed Section 25.5(f) provides that a Designation made by the Under Secretary shall be valid and effective for a term of five to eight years (as determined by the Under Secretary based upon the technology) commencing on the date of issuance.[25] The regulation also provides that the protections conferred by Designation shall continue in full force and effect indefinitely.[26] The Department specifically requests comments on the validity period of the Designation.[27]

b. While this term of Designation is addressed under the heading of Procedures in Section 25.5(f) of the proposed rule, we address it here as directly relevant to the Designation of a QATT. There is no statutory provision or legislative history to indicate that Congress intended that the Designation would exist for a fixed period of time. Furthermore, since one of the purposes of the Act is to encourage interested Sellers and developers to commit resources towards the development of anti-terrorism technologies, fixed periods of limitations may have a chilling affect on those developers. In our view, absent a change in circumstances after the approval of the Designation, or fraud in the application process, there is no public policy reason to impose a fixed period of time on the Designation period of a QATT.

c. However, if the Department does determine to impose a fixed term limitation, we strongly recommend that it be a uniform, single fixed period of time, and for as long as possible. A ten-year term would not be inappropriate. Of course, an application for renewal, if approved, would extend this term for an additional period, as determined by the Secretary.

d. Elsewhere in the regulations, the Department has proposed that Designation may be withdrawn or cancelled under specific circumstances. We address those circumstances in our comments relating to Section 25.5(i).

C. SECTION 25.4 OBLIGATIONS OF SELLERS

1. The coverage for liability insurance and its relationship to the Designation of QATT, to the continuing obligations to maintain coverage and protections and to the impact on the insurance industry are among the most difficult issues in the Act and the most challenging for the regulatory coverage. The supplemental information accompanying the rule notes that the "Department eschews any 'one-size-fits-all' approach to the insurance coverage requirements."[28] We strongly support that philosophical approach to the regulations and urge that this statement be included in the introductory provisions of any interim or final rule.

2. Section 864(a)(1) of the Act requires any person or entity that sells or otherwise provides a QATT ("Seller") shall obtain liability insurance of such types and in such amounts as shall be required in accordance with the section and certified by the Secretary to satisfy otherwise compensable third-party claims when QATT has been deployed in defense against or response or recovery from a terrorism act.[29] Proposed Section 25.4(a) repeats the statutory requirement, and adds authority for the Under Secretary to request at any time that the Seller or other provider of

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[25] 68 F.R. 41430 (July 11, 2003)
[26] Id.
[27] 68 F.R. 41422 (July 11, 2003)
[28] 68 F.R. 41424 (July 11, 2003); Specific Issue #6 – Amount of Insurance
[29] Section 864(a)(1) of P.L. 107-296; November 25, 2002

QATT submit information that would assist in determining the amount of liability insurance required, or show that the Seller or other provider has met all of the requirements of this section.[30]

3. We support the authority of the Under Secretary to request information that would assist in making the determination of the amount of liability requested. However, once the amount is set for a specific Designation based on a specific application submitted by a specific Seller, we do not believe the Department should subsequently and unilaterally vary the amount of insurance required for that Designated Seller to maintain its qualification, absent a request from the Seller for a reconsideration of the insurance certification due to changed circumstances or other reasons. This reconsideration approach is already addressed in proposed Section 25.4(h) – Under Secretary's certification – where the Seller may petition the Under Secretary for a revision or termination of the certification.[31]

4. The Act also provides for a maximum amount of required liability insurance and a necessary scope of coverage for such insurance.[32] Proposed Section 25.4(b) repeats the statutory requirement and adds the requirement for the Under Secretary to determine the amount of liability insurance required for each technology or family of technologies. The proposed regulations also permit the Under Secretary to consider nine non-exclusive factors in setting that amount.[33] Information derived from this list will assist the Department in setting the appropriate insurance amounts. We support the inclusion of the phrase "family of technologies" as supportive of the Department not looking at a case-by-case determination for each application or for each specific technology. Since the insurance may be looked at on a "family of technologies" basis, we find support for our earlier recommendation that an applicant may also apply for Designation for a "family of technologies."

5. The supplemental information accompanying the regulations, but not the regulations themselves, notes that the Department may consult with the Seller, the Seller's insurer and others.[34] While we support the Department's broad outreach to understand the appropriate insurance coverage that would be applicable to a technology, we urge the Department to use caution when discussing a Seller's insurance with an insurer without the Seller's knowledge and participation. Numerous business decisions are included in a Seller's decision to obtain coverage; the Department should have the benefit of the totality of the Seller's considerations, not simply the insurer's perspectives on the Seller's choices. Of course, we support the Department's continued outreach to the insurance community for assistance in assisting the Department in executing its responsibilities under the Act.

6. Section 864(a)(2) of the Act and Section 25.4(b) of the regulations address the maximum amount of insurance that a Seller is required to obtain. We encourage the Department to combine the regulatory coverage of this section with the provisions in Section 864(c) of the Act and to interpret the requirements of Section 864(c) of the Act (that establishes the maximum liability of all claims against the Seller at an amount required to be maintained by the Seller under Section 864 of the Act) as applying the maximum insurance amount as provided for in Section 864(a)(2) of the Act and Section 25.4(b) of the regulations.

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[30] 68 F.R. 41429 (July 11, 2003); Proposed Section 25.4(a)
[31] 68 F.R. 41430 (July 11, 2003); Proposed Section 25.4(h)
[32] Section 864(a)(2) of P.L.107-296; November 25, 2002
[33] 68 F.R. 41429 (July 11, 2003); Proposed Section 25.4(b)
[34] 68 F.R. 41424 (July 11, 2003); Specific Issue #6 – Amount of Insurance

7. Section 864(a)(3) of the Act and Section 25.4(c) of the regulations address identically the scope of the liability insurance coverage. This broad scope of coverage is understandable under the regime set for in the Act. We encourage the Department to provide flexibility in the administration of this section such that the scope of the insurance coverage must be in place by the time the application for Designation or Certification is granted – not necessarily at the time the application is submitted. We encourage the Department to provide flexibility in the administration of this section such that the scope of the entities protected by the insurance coverage may vary over time and typically many of these entities will not be known at the time of the application submission or application approval. Thus, we recommend that the Department require only that the insurance coverage be in place only by the time the application for Designation or Certification is granted – not necessarily at the time the application is submitted and that the scope of protected entities be fixed at the time of application approval. Given the length of time the Department has to review and approve an application, requiring such coverage prematurely could have a significant financial impact on Sellers, particularly small businesses. Furthermore, the Department should specifically recognize that the extension of the insurance protection to designated entities will vary over time as a technology moves from concept to sale; the number of entities to be protected will also vary over time as new sales are made. Nevertheless, an applicant and the Department must have some certainty in the application process in addressing only known coverage and known designated entities at the time of the application. The Department should explicitly provide that the unintentional omission of a designated party does not nullify the application or, by itself, rise to the level of fraud in the application process. The regulations should address the procedures for modifying the insurance coverage and for adding additional designated entities unintentionally omitted during the application process or first identified after an application is approved, and for deleting entities no longer subject to the protections. We do not believe the Department needs to treat these evolving requirements as a new application requiring further advance Departmental approval. In our view, adding or deleting entities is not, by itself, the "change in the types or amounts of liability insurance coverage" that requires notification to the Under Secretary pursuant to Section 25.4(g).

8. Section 864(a)(4) of the Act and Section 25.4(d) of the regulations provide identical requirements for the scope of coverage for third party claims. We encourage the Department to provide flexibility in the administration of this section such that the scope of the insurance coverage for third party claims must be in place only by the time the application for Designation or Certification is granted – not necessarily at the time the application is submitted. Given the length of time the Department has to review and approve an application, requiring such coverage prematurely could have a significant financial impact on Sellers, particularly small businesses.

9. Section 864(b) of the Act and Section 25.4(e) of the regulations provide identical requirements for the Seller to obtain a reciprocal waiver of claims from any party involved in the production or use of the QATT. Like the requirements of Section 25.4(c) regarding scope of coverage, we encourage the Department to provide flexibility in the administration of this section such that the scope of the reciprocal waivers for known entities must be in place only at the time the application for Designation or Certification is granted – not necessarily at the time the application is submitted. We also encourage the Department to provide flexibility in the administration of this section such that the identification of those entities for which cross-waivers are required may vary over time; typically many of these entities will not be known at the time of the application submission or application approval. Nevertheless, an applicant and the Department must have some certainty in the application process in addressing only known

designated entities at the time of the application. The regulations should address the procedures for adding additional designated entities first identified after an application is approved. The Department should also explicitly provide that the unintentional omission of a designated entity or the inability to obtain a particular waiver does not nullify the application or, by itself, rise to the level of fraud in the application process. The regulations should address the procedures for adding additional designated entities previously identified or unintentionally omitted during the application process, or first identified after an application is approved, or where despite good faith efforts no cross-waiver can be obtained; this is likely, in fact, when the customer is the federal government (or any other unit of government) that will not be initially familiar with the requirements of the SAFETY Act and lack policy guidance on the scope of authority to enter into such cross-waivers. The regulations should also address the procedure for deleting designated entities. We do not believe the Department needs to treat these evolving requirements as a new application requiring further advance Departmental approval; in our view, adding or deleting entities is not, by itself, the "change in the types or amounts of liability insurance coverage" that requires notification to the Under Secretary pursuant to Section 25.4(g).

D. SECTION 25.5 PROCEDURES

1. Application procedures

a. Section 25.5(a) provides a statement on the application procedures. It requires any Seller seeking Designation to submit "all information" supporting such request to the Assistant Secretary.[35] However, the word "all" is not otherwise explained. We recommend deleting the word "all" to avoid any implication that the Seller is under an obligation to undertake a comprehensive search for any information that has a bearing on the application and Designation process. Such a requirement would be inconsistent with the goals of the statute and the related provisions of the regulations. If necessary, it would be appropriate to indicate in this Section that applicants must fully complete the items on the Department's application form, including submitting the information requested by the Department.

b. The proposed rule provides that the application request is submitted to the Assistant Secretary, or such other official as the Under Secretary may designate from time to time. The additional disjunctive phrase is unnecessary; the Delegation provisions in proposed Section 25.2, and the definition of the term "Assistant Secretary" in proposed Section 25.9 already provide such flexibility.

c. This proposed paragraph also provides that the Under Secretary will make the application form available through various means. We strongly encourage the Department to expeditiously create the initial application form and make it widely and promptly available to facilitate interested Sellers making application for Designation. Timeliness of the application form is particularly important to meet the Department's goals, and industry's desire, to begin implementation of the SAFETY Act immediately with regard to Federal acquisitions and for the Department to begin accepting other SAFETY Act applications by September 1, 2003.

2. Initial notification

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[35] 68 F.R. 41430 (July 11, 2003)

Section 25.5(b) begins the 150-day Departmental review process for Designation (unless expedited). We encourage the Department to sufficiently staff the review process so that this initial notification process can move expeditiously. We encourage the Department to be as specific as possible with the applicant if the Department determines that its application is incomplete.

3. Review Process

Section 15.5(c) provides that the Assistant Secretary may, but is not required to, consult with others, in addition to the applicant. While we fully support the flexibility for the Department to consult with individuals or other entities to assist in the analysis of the information in the application, the regulations should explicitly provide that such consultation will be conducted to the maximum extent practicable without disclosing any of the applicant's proprietary information; if proprietary information must be disclosed, such consultation should be held only with those entities that agree in advance to protect the applicant's proprietary information.

4. Recommendations of the Assistant Secretary

Proposed Section 25.5(d) provides for the actions by the Assistant Secretary. The regulations provide authority for the Assistant Secretary to unilaterally extend the time period for more than ninety days upon notice to the Seller, but without the need to provide any reason or cause of such extension. While we can perceive of situations where information may be in the Department's possession that cannot for national or homeland security reasons be disclosed to the Seller, we encourage the regulations to provide that the Assistant Secretary will use this unilateral extension sparingly and will, to the maximum extent practicable, notify the Seller of both the amount of additional time the Assistant Secretary expects to take and any reason or cause for invoking the automatic extension.

5. Actions by the Under Secretary

Proposed Section 25.5(e) provides for the actions by the Under Secretary. The regulations provide authority for the Under Secretary to unilaterally extend the time period for more than thirty days upon notice to the Seller, but without the need to provide any reason or cause of such extension. While we can perceive of situations where information may be in the Department's possession that cannot for national or homeland security be disclosed to the Seller, we encourage the regulations to provide that the Assistant Secretary will use this unilateral extension sparingly and will, to the maximum extent practicable, notify the Seller of both the amount of additional time the Assistant Secretary expects to take and any reason or cause for invoking the automatic extension.

6. Term of Designation; renewal

Proposed Section 25.5(f) provides for the term of the Designation, proposing a term of five to eight years, as determined by the Under Secretary.[36] One element of this section is the imposition of a five to eight year term on the length of time for a Designation. As noted earlier in our comments, in our view, absent a change in circumstances after the approval of the Designation, there is no public policy reason to impose a fixed period of time on the Designation period of a

[36] 68 F.R. 41430 (July 11, 2003)

QATT. However, if the Department does impose a fixed term limitation, we strongly recommend that it be a uniform, single, fixed period of time, and for as long as possible; under such circumstances, a fixed ten-year term (with authority to extend based on reapplication) would not be inappropriate.

7. Termination of Designation resulting from substantial modification

Proposed Section 25.5(i) provides that a Designation shall terminate automatically, and have no further force or effect, if the QATT is significantly changed or modified. The proposal defined the term "significant change" as one that "could significantly affect the safety or effectiveness of the device," including a significant change or modification. We strongly oppose the automatic termination of the QATT Designation based on significant changes or modifications.

8. Termination of Designation resulting from substantial modification

a. Proposed Section 25.5(i) provides for the automatic termination of a Designation if the QATT is significantly changed or modified. We oppose the automatic termination provision provided for in the proposed rule; nothing in the statute or legislative history requires such automatic termination. Furthermore, by imposing such an automatic termination requirement, none of the entities that are covered by the protections of the Act and regulations will be able to rely on the Designation. Yet, we recognize that the Department's grant of approval is based on information submitted in good faith by an application and reviewed and approved by the Department. On balance, we believe Sellers should be informed that the application could be null and void if there is a significant change or modification and Sellers are encouraged to apply for the Modification of the Designation using the procedures of the Act. However, since the grant of Designation is solely within the jurisdiction of the Department, so to a Designation should be terminated only by the Department based on a finding of significant change, such as if challenged during litigation or at any time if any entity is aware of a circumstance that may indicate a significant change.

b. We also encourage the Department to adopt a shorter, even expedited, review process for an application for modification or a determination of significant change.

9. General

Any interim or final regulation should clearly state that any application process – whether the initial application, an application for modification, or an application for renewal -- will be covered by the provisions of Section 25.8 relating to the confidentiality and protection of information, and recommend that the regulations explicitly state such coverage. We comment below on our suggestions for the treatment of proposed Section 25.8.

E. GOVERNMENT CONTRACTOR DEFENSE

1. Section 863(d) of the Act and proposed Section 25.6 of the regulations address the provisions for Certification of a QATT as issuing a Certificate of Conformance and place the technology on the "Approved Product List for Homeland Security" for purposes of eligibility for the government contractor defense. This is one of the central provisions of the Act that deserves careful attention and clear regulatory guidance.

2. As an initial matter, we assume that the title "approved product list" in the Act and the regulations is not intended by Congress or the Department to exclude services. In our view, since the Act and the regulations intentionally use the term "anti-terrorism technology" as that term is defined in the Act and regulations – that this term specifically includes services.

3. The proposed regulations include a requirement that the Seller provide safety and hazard analyses and other relevant data and information regarding such technology. This is a good example of how the regulations recognize the need to address differently the information that may be available and applicable to products that may not be available or applicable to services. We urge the Department to interpret this statutory provision so that the Seller is only obligated to submit this information if it is relevant and applicable to the technology; such information may not exist for services and should not be a threshold qualification standard for Certification. However, the Department should not share any company-designated proprietary information outside the Department without a specific non-disclosure agreement.

4. Section 25.7 of the proposed regulations addresses the procedures for requesting and granting Certification as an "Approved Product for Homeland Security." The application procedures in the proposed rule for Certification are similar to the application procedures for Designation under Section 25.5 of the proposed rules, and in our view, the processes should be substantially similar. By the same token, PSC's comments relating to the application for Designation in Part E above are also applicable here; we have not repeated them.

5. Section 25.7(a) further provides that an application for Certification may not be filed unless the Seller has also filed an application for Designation for the same technology.[37] The Department permits both an application for Designation and an application for Certification to be filed simultaneously.[38] Section 25.7(f) further requires the Secretary's Designation of a technology under Section 25.3 as a pre-condition for Certification under this Section. We acknowledge the distinction between the two Secretarial approvals.[39] Thus, it is extremely important that the Department specify the Certification application form and the information submission requirements required to accompany a request for Certification, to the maximum extent practicable consistent with the flexibility required to account for the variations in technologies. In the interest of conserving time and maximizing the use of scarce government and Seller resources, we will also encourage Sellers who have an interest in obtaining both Designation and Certification to submit both applications together and urge the Department to review both simultaneously.

6. Finally, any interim or final regulation should clearly state that any consultation that the Under Secretary may consult with as part of the Certification process will be covered by the provisions of Section 25.8 relating to the confidentiality and protection of information, and recommend that the regulations explicitly state such coverage. We comment below on our suggestions for the treatment of proposed Section 25.8.

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[37] 68 F.R. 41431 (July 11, 2003)

[38] Id.

[39] 68 F.R. 41422 (July 11, 2003) stating "The distinction between the Secretary's two actions is important, however, because the approval process for the government contractor defense includes a level of review that is not required by the Designation of a qualified anti-terrorism technology."

F. SECTION 25.8 CONFIDENTIALITY AND PROTECTION OF INTELLECTUAL PROPERTY

1. We compliment the Department for recognizing the importance of protecting the confidentiality of an applicant's intellectual property, trade secrets and other confidential information.[40] Proposed Section 25.8 provides that the Secretary, in consultation with the Office of Management and Budget, shall establish confidentiality protocols for maintenance and use of information submitted to the Department under the SAFETY Act and this Part. Such protocols shall, among other things, ensure that the Department will utilize all appropriate exemptions from the Freedom of Information Act. [41]

2. We recommend that the heading be revised to read "Confidentiality and protection of information" since the scope of coverage is much broader than just "intellectual property." Furthermore, any interim or final rule should explicitly provide procedures that applicants should follow. For example, we strongly recommend that the Department develop a proprietary data marking or other application notice by which applicants highlight or disclose those portions of its application it considers to be proprietary. The Department would be well advised to adopt the various markings for proposal submissions and/or rights in technical data, already provided for in the Federal Acquisition Regulation and well understood by most contractors and government officials engaged in the federal procurement process.

3. In addition, during the consultation period with potential applicants and until an application is approved, we recommend that the Department treat even the submission of the application as confidential. Once an application is approved, the Department must still recognize the importance of protecting company proprietary information included in the application; in fact, from a homeland security perspective, the Department may even want to protect details about the technology and its potential uses. However, we recognize that the public has an interest in knowing who has received Designation and Certification from the Department and the Department should develop a mechanism of publicly disclosing such information. Here, too, the Department could benefit from adopting procedures used by federal agencies when announcing contract awards of unclassified contracts over a given threshold. These techniques are well understood by agencies contracting, public affairs and FOIA offices.

4. Regardless of the status of an application, the Department should not share any company-designated proprietary information outside the Department without a specific non-disclosure agreement.

G. RELATIONSHIP OF SAFETY ACT TO P.L. 85-804

Section 865(6) defines the term "non-Federal Government customers" to mean any customer of a Seller that is not a federal agency with P.L. 85-804 authority. The Specific Issues discussion highlights the relationship of the SAFETY Act to the indemnification provisions of P.L. 85-804.[42] We compliment the Department for acknowledging both the Congressional and Departmental coverage of the relationship between these two important government contracting

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[40] 68 F.R. 41423 (July 11, 2003); Specific Issue #3, Protection of Intellectual Property

[41] 68 F.R. 41432 (July 11, 2003)

[42] 68 F.R. 41425 (July 11, 2003); Specific Issue #8, Relationship of the SAFETY Act to Indemnification under P.L. 85-804.

statutes; clearly there are circumstances under which these two acts can, and should, co-exist. However, there is no coverage in the proposed regulations even on procedures that a Seller, a potential Seller, or a federal government customer should follow to more fully understand the relationship between these two acts, the consultation procedures required by Executive Order 13286 (February 28, 2003) and the means for the Secretary to advise whether SAFETY Act coverage would be appropriate. Minimal procedures, such as a new Part 25.10, entitled "Relationship between SAFETY Act and P.L. 85-804," addressing an application form, points of contact within the Department of Homeland Security, and factors that the Department (and possibly OMB) would consider in making the determination would be extremely valuable.

VI. CONCLUSION

1. PSC fully supports the SAFETY Act, and encourages the Department to move expeditiously with interim regulations on key initial sections of the regulations. We strongly support the Department's stated goal of applying the SAFETY Act to any relevant pending federal procurement, and to begin applying the Act to other provisions effective September 1, 2003; thus we urge the Department to not wait for the next phase of rulemaking but to promptly publish the application forms for both Designation and Certification so that prospective applicants may begin their preparations.

2. The Act is clear and unmistakable about its applicability to services. Congress intended that services be treated the same as any other anti-terrorism technology in terms of procedures to be followed and benefits to be conferred. PSC was instrumental in achieving that legislative construct. We appreciate that the Department has followed through on the legislative design by including services in this proposed rule. We recognize and support the fact that the uniform application process for Designation and for Certification may require additional information to be submitted by firms offering services technologies. We also believe, as noted earlier, that additional rulemaking and public discourse is essential if the rule is to meet its full objectives.

3. We urge the Department to move expeditiously on interim regulations focusing on the necessary application procedures and Designation and Certification procedures. In addition, while we compliment the Department's recognition that any information submitted by private sector firms may be proprietary and thus subject to protection, the proposed regulations are silent on the coverage; we strongly urge the Department to "fill in the gaps" by explicitly addressing this critical area through expanded regulatory coverage in addition to the statement of regulatory philosophy. For example, the Department could draw easily from the marking and identification process used in the federal procurement system.

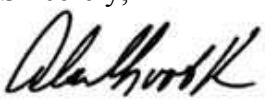
4. While all aspects of the SAFETY Act require full and prompt regulatory coverage, we believe some aspects of the regulatory coverage of the SAFETY Act can be deferred for a few weeks while more critical, short-term aspects, are addressed.

5. We encourage the Department to consider a public meeting to provide a dialogue between the Department and the affected industry communities to further explore key elements of the regulatory implementation.

6. Finally, PSC would welcome any opportunity to work cooperatively with the Department on the further development of the regulations and in monitoring the implementation of the Act and regulations.

We appreciate the opportunity to comment on these proposed regulations. In the interim, if PSC can provide you with any additional information, please do not hesitate to let us know.
I can be reached at (703) 875-8059 or at Chvotkin@pscouncil.org.

Sincerely,



Alan Chvotkin
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